United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-7069

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7206

HIDROCARBUROS Y DERIVADOS, C.A.,
Plaintiff-Appellee,

against

NEREUS SHIPPING, S.A.,
Defendant-Appellant,

and

COMPANIA ESPANOLA DE PETROLEOS, S.A.,
Defendant-Appellee.

Docket No. 75-7207

In the Matter of the Arbitration

between

HIDROCARBUROS Y DERIVADOS, C.A.,
Petitioner-Appellee,

against

NEREUS SHIPPING, S.A.,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF HIDROCARBUROS Y DERIVADOS, C.A., AS APPELLEE

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BRIEF OF HIDROCARBUROS Y DERIVADOS, C.A., AS APPELLEE

Statement

These cases are on appeal from the order of the United States District Court for the Southern District of New York by the Honorable Charles E. Stewart dated March 21, 1975, ordering consolidation of two related arbitrations instituted under a single maritime contract of affreightment with the first arbitration instituted between the charterer and the owner of the vessels and the other arbitration between the owner of the vessels and the guarantor of the charterer.

Also briefed with these cases by the other parties are an appeal and cross appeal from the order of Judge Stewart dated December 18, 1974 in a previous separate action, finding that the guarantor was bound by the arbitration requirement of the contract of affreightment under the terms of its guaranty.

Prior Proceedings

On February 5, 1975, Hidrocarburos y Derivados, C.A. (hereinafter referred to as "Hideca"), the Charterer under a contract of affreightment dated January 27, 1971 (see A 16-A 16d;* hereinafter referred to as the "Contract") between Hideca and Nereus Shipping, S.A. (hereinafter referred to as "Nereus") as Owner of the vessels chartered, instituted two proceedings in the District Court. In an action against Nereus and Compania Espanola de Petroleos, S.A. (hereinafter referred to as "Cepsa"), the Guar-

* References to page numbers preceded by "A" are to the Joint Appendix.

antor of the Contract, Hideca sought a stay of the arbitration between the Owner Nereus and the Guarantor Cepsa pending the outcome of the arbitration which had been earlier instituted between Hideca and Nereus, the real parties in interest (A 112-A 129). The complaint and motion papers alleged that because both arbitrations involved the same contract as well as the same facts and issues, allowing the Nereus-Cepsa arbitration to proceed first or simultaneously would irreparably harm Hideca. It was alleged that Cepsa as Guarantor would undoubtedly seek reimbursement from Hideca for any award against it. Furthermore, there could be inconsistent awards and unnecessary arbitration proceedings if the two arbitrations both proceeded; whereas, allowing the Hideca-Nereus arbitration to proceed first would dispose of substantially all of the issues without prejudice to Nereus. Together with that action, a petition was filed pursuant to Section 5 of the Federal Arbitration Act, 9 U.S.C. § 5, seeking the appointment of a third arbitrator in the Hideca-Nereus arbitration (A 226-A 239).

After receiving affidavits and memoranda of law from the parties and after hearings held with the attorneys in which both a stay of one arbitration and consolidation of both arbitrations were considered, Judge Stewart ordered, on March 21, 1975, a consolidation of the two arbitration proceedings (A 218-A 222). Judge Stewart held that a federal district court has the power to consolidate two related arbitrations and that this was a proper case

> "since it would avoid the additional time and expense of separate proceedings in two matters involving common questions of law and fact. In addition, consolidation would avoid the possibility that one of the parties would be subject to inconsistent results. [citation omitted] Moreover, we do not believe that any party will be prejudiced by a consolidation of the two arbitration proceedings." (A 220)

Judge Stewart, in assuring that all parties would have their disputes heard before an impartial arbitral tribunal, ordered that each party would appoint one arbitrator and those three arbitrators would appoint two others (A 221).

In a previous action to which Hideca was not a party (See Memorandum and Order of Judge Stewart at A 99), Judge Stewart, in denying Cepsa's request for an injunction and declaratory relief, held that Cepsa had by its Guaranty consented to arbitration of disputes pursuant to the Contract.

All the proceedings to date have been solely procedural. Some facts were asserted by attorneys' affidavits and a few exhibits but substantially all of the underlying facts and the merits of the controversies to be arbitrated are in dispute and have not been ruled upon below.

Facts

Nereus as Owner and Hideca as Charterer entered into the Contract dated January 21, 1971 which provided for the chartering of oil tankers by Hideca from Nereus to carry a total of approximately 600,000 tons of crude oil per year for three years. Except for providing for a range of ports at which loading and discharge could occur, the Contract did not specify from whom the oil was to be purchased and to whom it was to be sold. Addendum No. 2 to the Contract dated June 24, 1971 (See A 16e; hereinafter referred to as the "Guaranty") provided a guaranty of Hideca's performance under that Contract by Cepsa.

During the course of the Contract, disputes arose between Hideca and Nereus regarding actions taken by both parties and the interpretation of certain contract terms and procedures. For example, one of the earliest disputes involved the unauthorized withdrawal of a vessel in June of 1973 by Nereus after it had been duly nominated by Nereus and

accepted by Hideca pursuant to the Contract at a time when the market rate for freight carried on such a vessel was unusually high. In July of 1974 the disputes began which ended in termination of the Contract. These concerned the 17th voyage under the Contract—that of the MAJESTIC, which sailed from Ras Tanura on June 3, 1974 and completed discharge at Mohammedia, Morocco on July 12, 1974 (A 161-A 162).

On July 2, 1974, Nereus obtained orders from a court in Casablanca for attachment of proceeds to be received by Hideca from the sale and delivery of the MAJESTIC's cargo of crude oil, at the discharge port of Mohammedia in Morocco and, on July 10, 1974, the order was served on putative garnishees in Morocco. The order of attachment was based on a lien on the freight for that voyage of the MAJESTIC but that freight payment was not in fact due until July 12, 1974 (A 161-A 162). Discussions were held in London on July 15, 1974 and thereafter in London and New York between representatives of Hideca and representatives of Nereus. Pursuant to these discussions, plans were made, subject to a final settlement agreement in writing, for an escrow account to be established by Hideca covering the amount of the freight due for the MAJESTIC under the Contract and other sums allegedly due for demurrage and related matters with respect to other voyages with some amounts to be transferred upon lifting of the attachment in Morocco and other amounts to remain in escrow pending the receipt of documents and possible arbitration. On July 19, 1974, Hideca made arrangements with its bank for the transfer of $1,236,846.23 to the bank where the escrow account was to be established (A 162-A 163).

On July 24, 1974, during the final stages of preparation of the escrow documents, Nereus notified Cepsa that it was invoking the Guaranty and that it was no longer considering Hideca a responsible party under the Contract (A 164). On July 26, 1974, unknown to Hideca until the current pro-

ceedings brought it to light, Nereus commenced an action pursuant to Section 8 of the Federal Arbitration Act, 9 U.S.C. § 8, to obtain security by attachment for claims it alleged it had which were arbitrable with Hideca. In that complaint Nereus sought against Hideca damages totalling over $4,000,000 for demurrage and other charges relating to previous voyages, as well as freight and demurrage for voyage No. 17 and damages in the amount of $3,000,000 for the alleged wrongful termination of the Contract by Hideca (A 211-A 217). At the same time that Nereus was proceeding in various courts, the nomination of the TROPIC was pending and on July 11, 1974 the MAJESTIC was nominated, both for voyages under the Contract. As it had done previously under the Contract, Hideca notified Nereus that it was unable to use one of the vessels—the TROPIC—at the time for which it was nominated, but it did accept the nomination of the MAJESTIC.

It subsequently developed that the order of attachment in Morocco was not effective and, on August 23, 1974, Hideca served a Notice of Arbitration (A 17-A 18) on Nereus naming its arbitrator and stating claims against Nereus for breach of the entire Contract, improperly withholding from Hideca a vessel which had been duly nominated and accepted, improper and wrongful attempts to attach assets of Hideca in Morocco and improper and wrongful invocation of the guaranty of Cepsa. Nereus answered by letter dated September 9, 1974 (A 19) naming its arbitrator and setting forth its claims. In the meantime, Nereus had on September 3, 1974 demanded arbitration by Cepsa with Nereus (A 20-A 21). On September 16, 1974, Cepsa rejected Nereus' demand for arbitration (A 22-A 28) and thereafter Nereus, claiming a right to do so under clause 24 of the Contract, appointed a second arbitrator and the two then chose a third. On November 22, 1974, Cepsa moved to enjoin the arbitration between Nereus and Cepsa on the grounds that (a) Cepsa was not subject to the arbitration clause of the Contract, (b) the arbitration between Nereus and Cepsa could only proceed should

Hideca default with respect to its obligations under the Contract, including the arbitration provision thereof and (c) the panel was improperly constituted, there being no arbitrable dispute between Nereus and Cepsa at the time of its appointment (A 2-A 7).

On December 18, 1974, Judge Stewart, in the action by Cepsa against Nereus in his Memorandum Decision (A 99-A 107) stated that:

> ". . . [D]efendant alleges that Hideca defaulted in its performance of the contract during the third year. That dispute is the subject of separate arbitration proceedings by Hideca against defendant Nereus; there is apparently no contention that these arbitration proceedings were improperly brought and, in any event, they are not presently before us." (A 99-A 100)

Judge Stewart then proceeded to find that the Guaranty did incorporate the arbitration clause in the Contract and thus the effect was that Cepsa consented to arbitrate disputes under the Contract. Cepsa filed a notice of appeal in that action on January 17, 1975 (A 108).

The Guaranty states in part:

> "[W]e . . . hereby agree that, *should* HIDECA *default in payment or performance of its obligations* under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party." (A 16e) [emphasis added]

Because the two arbitrations involve the same maritime contract and the same facts and issues (since Hideca's default or Nereus' breach is a central issue in both arbitrations), once Cepsa was found to be under a duty to arbitrate, Hideca's attorneys suggested to Nereus' attorneys that the arbitrations be consolidated to save time and insure that all disputes would be settled. In January 1975 Nereus' attorneys responded that they intended to proceed

with the arbitration against Cepsa and that they were not interested in arbitrating with Hideca because they regarded Cepsa as better able to pay an award (A 128-A 129).

On February 5, 1975, fearful that the Nereus-Cepsa arbitration would proceed before a panel chosen by Nereus to hear and decide the issues of Hideca's and Nereus' performance of the Contract and that the Hideca-Nereus arbitration would not proceed at all for failure to have a full panel appointed, Hideca started an action against Nereus and Cepsa to stay the Nereus-Cepsa arbitration and instituted a supplementary proceeding against Nereus to obtain appointment of a third arbitrator to the Hideca-Nereus panel.

On March 21, 1975, Judge Stewart decided to consolidate the two arbitrations instituted under the Contract.

POINT I

The order of the District Court consolidating two related arbitrations is not appealable at this stage.

Orders granting or denying consolidation are interlocutory orders within the sound discretion of the District Court and are not ordinarily appealable until final judgment is entered. In *Levine* v. *American Export Industries,* 473 F.2d 1008, 1009 (2d Cir. 1973), this Court held that "[a]bsent exceptional circumstances this court lacks jurisdiction to entertain such an interlocutory appeal". *See also Nolfi* v. *Chrysler Corp.,* 324 F.2d 373 (3d Cir. 1963); *Travelers Indemnity Co.* v. *Miller Mfg. Co.,* 276 F.2d 955 (6th Cir. 1960); *Skirvin* v. *Mesta,* 141 F.2d 668 (10th Cir. 1944); 9 Moore's Federal Practice ¶ 110.13(8) (2d ed. 1973). In this case of consolidated arbitrations the final judgment will be the judgment which must be entered on the arbitration award.[1]

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[1] Clause 24 of the Contract provides in relevant part:

". . . judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises." (A 16c)

Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, establishes the procedure for federal district courts having jurisdiction over the parties to enter judgment on maritime arbitration awards.

Even 28 U.S.C. § 1292(a)(3) which provides for an immediate appeal of an interlocutory order "determining the rights and liabilities of the parties to admiralty cases" does not permit an interlocutory appeal of procedural orders such as orders of consolidation. In general, 28 U.S.C. § 1292(a)(3) has been interpreted to allow an appeal whenever an order dismisses a claim for relief on the merits. *Emerick* v. *Lambert*, 187 F.2d 786 (6th Cir. 1951); 9 Moore's Federal Practice ¶ 110.19(3) (2d Ed. 1973).

So strong is the policy to avoid never-ending appeals from interlocutory orders that Judge Friendly, speaking for this Court in *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 774 (2d Cir. 1972), stated:

> "[W]e have often held that mere inability to secure review of an interlocutory order on appeal from the final judgment does not warrant permitting immediate review of such orders."

The order of the District Court consolidating the two arbitrations is not an order compelling arbitration *per se* pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, so as to make it appealable at this stage. Nereus does not dispute its obligation to arbitrate but the manner of arbitration and the number of arbitrators provided by the order of the District Court.[2] Cf. *Interocean Shipping Co.* v. *National Shipping & Trad. Corp.*, 462 F.2d 673, 675 (2d Cir. 1972) and cases cited therein where the real issues are always whether or not a party had an obligation to arbitrate at all.

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[2] See discussion in Point III—The Order of the District Court Consolidating Two Related Arbitrations is not Contrary to the Provisions of The Federal Arbitration Act, and the discussion of *Robinson* v. *Warner, infra* at pp. 14-16 of Point IV—The District Court Correctly Held it has the Power to Order Consolidation of Related Arbitrations.

Thus, the order of the District Court consolidating the Hideca-Nereus and the Nereus-Cepsa arbitrations is not appealable at this stage and the appeals should be dismissed.

POINT II

The order of the District Court consolidating two related arbitrations is not an improper modification of its previous order on which an appeal was taken by Cepsa.

Nereus asserts (Nereus Brief, Pt. I) that the order of Judge Stewart on March 21, 1975 in the two proceedings brought by Hideca is an improper modification of his order entered December 18, 1974 in the action brought by Cepsa against Nereus. All the cases cited by Nereus deal with subsequent proceedings in the same action in which the original order or judgment was entered and appealed to the Circuit Court.[3]

Applicable to the instant situation in which orders were entered in separate actions is *District 2, Marine Engineers Ben. Ass'n* v. *Falcon Carriers, Inc.*, 374 F.Supp. 1342 (S.D.N.Y. 1974). In that case the first action decided involved an application for a preliminary injunction restraining the defendant from transferring vessels pursuant to a written charter prior to the determination of certain disputes to be arbitrated. The District Court denied

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[3] *United States* v. *Radice*, 40 F.2d 445 (2d Cir. 1930) and *Rolle* v. *N.Y.C. Housing Authority*, 294 F.Supp. 574 (S.D.N.Y. 1969) involved motions to intervene; *Weiss* v. *Hunna*, 312 F.2d 711 (2d Cir. 1963) and *Daniels* v. *Goldberg*, 8 F.R.D. 580 (S.D. N.Y. 1948) *aff'd*, 173 F.2d 911 (2d Cir. 1949) involved motions to vacate or set aside a judgment; *Ritter* v. *Hilo Varnish Corp.*, 186 F.Supp. 625 (S.D.N.Y. 1960) involved a motion to vacate a judgment of dismissal with leave to file for a summary judgment; *Freedman* v. *Overseas Scientific Corp.*, 150 F.Supp. 394 (S.D.N.Y. 1957), *aff'd*, 248 F.2d 274 (2d Cir. 1957) involved a motion to modify an interlocutory decree regarding patent infringement.

the motion for a preliminary injunction and an appeal was taken. In the second action the defendant applied for a permanent stay of arbitration. The basis for the stay of arbitration was the existence and effect of an alleged side agreement, one of the disputes to be arbitrated, of which the Court was aware in the first action. However, the District Court found that the second action sought relief and raised issues other than those presented in the first action and held "it is settled that an interlocutory appeal from the denial of preliminary injunctive relief divests the court only of jurisdiction with regard to questions raised and decided upon the interlocutory order appealed from." 374 F.Supp. at 1345.

Judge Stewart specifically found in his order of December 18, 1974:

> "[D]efendant alleges that Hideca defaulted in its performance of the contract during the third year. That dispute is the subject of separate arbitration proceedings by Hideca against defendant Nereus; there is apparently no contention that these arbitration proceedings were improperly brought and, in any event, they are not presently before us." (A 99-A 100)

The only matter before Judge Stewart in the Cepsa-Nereus action was the question of whether or not Cepsa had an obligation to arbitrate and Judge Stewart only considered and decided that matter relating to the Cepsa-Nereus arbitration. He specifically denied having the Hideca-Nereus arbitration before him and therefore could not consider and rule on the order of arbitrations or consolidation of arbitrations. Consequently, the decision of Judge Stewart ordering consolidation of two related arbitrations is not an improper modification of his first decision concerning the obligation of Cepsa to arbitrate.

POINT III

The order of the District Court consolidating two related arbitrations is not contrary to the provisions of the Federal Arbitration Act.

Nereus has attempted to characterize Judge Stewart's order of consolidation of related arbitrations as an order compelling arbitration. Nereus has never denied that it must arbitrate with Hideca and that it must arbitrate with Cepsa. In fact Nereus asserts that it instituted both arbitrations. (Nereus Brief, p. 31 and pp. 4-5). Nereus argues that it cannot be compelled to arbitrate before a five-person arbitration panel and asserts that such a result is contrary to the Federal Arbitration Act.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides a remedy to compel arbitration when one party denies its obligation to arbitrate but is not a bar to consolidation. Section 4 provides in part:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

The purpose and intent of Section 4 are clearly to facilitate and compel arbitration when it has been agreed to in writing by the parties. In the Federal Arbitration Act

> "Congress has expressed a strong policy favoring arbitration before litigation, and the courts are bound to

> take notice of this broad policy as well as specific statutory provisions in dealing with arbitration clauses in contracts." *J. S. & H. Construction Co.* v. *Richmond County Hospital Authority,* 473 F.2d 212, 214-15 (5th Cir. 1973).

The Federal Arbitration Act is thus a vehicle to enable the courts to facilitate arbitration, which is a means to "expedite the disposition of commercial disputes." *Petition of Dover Steamship Company,* 143 F.Supp. 738, 740 (S.D. N.Y. 1956). There is no basis for concluding that Section 4 prohibits consolidation of arbitrations.

The cases cited by Nereus (Nereus Brief, Point IV) restating and interpreting the Federal Arbitration Act and specifically 9 U.S.C. § 4, contain general language about arbitration and arbitration contracts but do not stand for the proposition that the Federal Arbitration Act is a bar to consolidation of related arbitrations. For instance, *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), did not involve consolidation of arbitrations but rather presented the very different question of whether an advance agreement to arbitrate any disputes subsequently arising out of a contract was unenforceable in view of the existence of alleged violations of the Securities Exchange Act of 1934. The Supreme Court held that the objecting party had to arbitrate but it did not rule as to the particular method or procedure of that arbitration. In *A/S Ganger Rolf* v. *Zeeland Transportation, Ltd.,* 191 F.Supp. 359, 363-64 (S.D.N.Y. 1961), the District Court denied a motion to compel arbitration, saying that the issue in that case was as follows:

> "What petitioners really want here is a judgment declaring that Zeeland is bound by the arbitration clause in advance of arbitration as insurance against the possibility that they may be mistaken in their assertion that it is bound."

Although the Federal Arbitration Act provides a vehicle whereby one party can compel another to fulfill its obligations to arbitrate under a written arbitration agreement, the Act does not, as Nereus asserts, prevent a district court from ordering a consolidation of related arbitrations or dictate the manner in which such consolidation can be effected.

POINT IV

The District Court correctly held that it has the power to order consolidation of related arbitrations.

Although Nereus as Appellant challenges the power of the District Court in so far as it contends that the order of consolidation improperly modifies the December 18, 1974 order and Nereus attacks the manner of the consolidation (Nereus Brief, Points I, IV, V and VII), it does not challenge the power of the District Court to order consolidation of two related arbitrations which involve the same Contract, concern similar and overlapping issues of fact and law, and where there is no substantial prejudice shown to any party.[4] Instead, Nereus attempts to restrict those cases in which district courts have granted consolidation

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[4] Nereus does challenge the District Court's power to stay one maritime arbitration pending the outcome of another (Nereus Brief, Point II at pp. 13-14). However, the District Court did not issue an injunction and therefore the issue of the District Court's power to issue an injunction in an admiralty proceeding is not an issue on appeal. Moreover, Nereus never sought the relief—a dismissal for failure to state a cause of action—which it now says the District Court should have granted.

Nereus further implies that the issue of consolidation of separate arbitrations was not before the District Court. However, there can be no doubt that consolidation was given lengthy consideration in hearings before Judge Stewart in chambers and that that consideration is further reflected in letters and memoranda of law submitted to the District Court and proposed orders submitted by both Nereus and Hideca at the request of the District Court (Supplemental Appendix).

of related arbitrations to their facts and ignores the distinction between a district court's power to order consolidation of arbitrations and the proper exercise of its discretion in a particular case.

Since consolidation is procedural and not covered by the Federal Arbitration Act, by virtue of Rule 81(a)(3) of the Federal Rules of Civil Procedure (hereinafter "F.R.C.P."), Rule 42(a), F.R.C.P., is applicable (See Judge Stewart's Memorandum and Order, A 219).[5] The District Court has the power to order a consolidated arbitration even when there are separate agreements to arbitrate embodied in two separate contracts. *Robinson* v. *Warner,* 370 F.Supp. 828 (D. R.I. 1974); *Lavino Shipping Co.* v. *Santa Cecilia Co.,* 1972 A.M.C. 2454 (S.D.N.Y. 1972); *Chilean Nitrate* v. *Intermarine Corp.,* 1972 A.M.C. 2460 (S.D.N.Y. 1971); *cf. Showa Shipping Co.* v. *A/B Bellis,* 1972 A.M.C. 2458 (S.D.N.Y. 1972); *see also Vigo Steamship Corp.* v. *Marship Corp.,* 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970).

In *Robinson* v. *Warner, supra,* the District Court in holding that it had the power to compel a consolidated

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[5] F.R.C.P. Rule 81(a)(3) states in its entirety:

"In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

F.R.C.P. 42(a) states in its entirety:

"*Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

arbitration when the agreements to arbitrate were embodied in separate contracts and neither of the separate contracts provided for consolidation of arbitrations concluded as follows:

> "[A] consolidated proceeding in a tri-partite dispute as presented here is clearly the preferred procedure." *Supra* at 829.

The District Court cited M. Domke, The Law and Practice of Commercial Arbitration § 27.02 at 272-73 (1968), which states in part:

> "The general rule is that a court *may* order consolidation of arbitration proceedings where the parties are not the same if the issues are substantially the same and if no substantial right is prejudiced."

The District Court in *Robinson* v. *Warner* concluded that it did not have the power under 9 U.S.C. § 4 to order consolidation of arbitrations but it did hold that it had inherent power to consolidate arbitrations under Rules 42(a) and 81(a)(3), F.R.C.P. The court then examined the facts of *Robinson* and further concluded that on the facts of that case involving a contractor's claim for additional expenses and an architect's responsibility in designing and supervising the construction of a building, that:

> "A consolidated proceeding, under such circumstances would appear to be a more efficient method in solving these disputes and apportioning any liability that may be found. Furthermore, it would avoid the possibility of conflicting awards which could conceivably leave the plaintiffs without any remedy." 370 F.Supp. at 829.

The Court found that the facts of the two disputes involved the same course of dealings and the construction of the same dwelling. The Court went on to weigh the benefits of consolidation and the hardships claimed and con-

cluded "[t]he mere desire to have one's dispute heard separately is not a sufficient showing of hardship that would counterbalance the considerable benefits served by consolidated arbitration." 370 F.Supp. at 831.

In maritime cases, where arbitration is frequently chosen as a substitute for litigation, the District Court has also concluded that it possesses the power to order a consolidation of arbitrations under Rules 42(a) and 81(a)(3), F.R.C.P.

> "The basic criterion for consolidation then is an identity of issues . . . and . . . consolidation should be granted unless it would result in demonstrable prejudice to the opposing party." *Lavino Shipping* v. *Santa Cecilia Co., supra* at 2456, citing in part *Chilean Nitrate* v. *Intermarine, supra.*

In both *Lavino Shipping* and *Chilean Nitrate* two separate but almost identical charter parties involving three principal parties were involved. In both cases the two contracts provided for arbitration, but not for consolidated arbitrations. In each case the District Court looked to the identity of issues and/or facts and found that, in the absence of a substantial showing of prejudice,[6] consolidation of arbitrations was appropriate when "[t]here is a distinct overlap between factual and legal issues presented by the two arbitrations." *Chilean Nitrate* v. *Intermarine Corp., supra* at 2461.

The facts of the instant cases even more clearly compel the necessity for a consolidated arbitration. In addition

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[6] In *Showa Shipping Co.* v. *A/B Bellis*, the District Court, in considering the consolidation of two arbitrations involving two separate contracts, denied consolidation and found prejudice was shown when the central issue in each arbitration was the alleged material misrepresentation of two different parties since:

> "the fact of misrepresentation and its materiality may widely differ in the case of each of the separately negotiated charter parties." *Supra* at 2459.

to the possibility of inconsistent awards, Hideca would suffer substantial prejudice if the arbitration between Nereus and Cepsa was allowed to proceed first or if both arbitrations were allowed to proceed simultaneously. The issue of breach of contract—by either Hideca or Nereus—is central to both arbitration proceedings[7] and an award in the Nereus-Cepsa arbitration (in which the panel was chosen by Nereus) would necessarily deal with that issue without Hideca's participation while Cepsa would undoubtedly seek reimbursement from Hideca for any award so rendered.

On the other hand, Nereus has not asserted or proven any prejudice to it by virtue of a consolidated arbitration other than to assert:

> "But where Cepsa has no obligation to pay any arbitration award in favor of Nereus against Hideca, an order to consolidate in such case is an unconscionable intrusion upon the contract rights of Nereus and prejudicial to its position in arbitration." (Nereus Brief, p. 33)

There is but one contract involved and the major issue is the performance or non-performance of the principal parties and consequent potential liability of the Guarantor. Judge Stewart correctly held that the District Court has the power to order consolidation of such related arbitrations under a single contract, and in view of the potential benefits (avoiding inconsistent awards and facilitating the resolution of all disputes) and the lack of prejudice to the objecting party, the order was within the proper exercise of his discretion as discussed below.

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[7] Contrary to the assertions of Nereus (Nereus Brief, p. 34) the issue of default is the central issue in both proceedings and involves the introduction of contested facts by both documents and witnesses. (A 150-A 152)

POINT

The order of the District Court consolidating two related arbitrations was a proper exercise of its discretion.

Consolidation of arbitrations is largely a matter of discretion for the District Court. *Chilean Nitrate* v. *Intermarine Corp., supra* at 2461. Thus, the test on appeal is not whether the Circuit Court of Appeals would have granted or denied a consolidated arbitration proceeding but whether the District Court abused its discretion. In such a case an order should not be lightly disturbed on appeal. *Cf.* 7 Moore's Federal Practice § 65.04(2) (2d Ed. 1973).

Consolidation of arbitrations involves the weighing of interests between the benefits of consolidation and any substantial prejudice to an objecting party.[8] In weighing similar considerations this Court has stated that the findings of the District Court in weighing the interests of both parties and making a decision within its discretion will not be disturbed unless "clearly erroneous" and a "clear abuse of discretion." *Unicon Management Corp.* v. *Koppers Company,* 366 F.2d 199, 203 (2d Cir. 1966); *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.,* 366 F.2d 373, 374-75 (2d Cir. 1966). Nereus has not asserted or made such a showing. Judge Stewart correctly found that:

> "While it is true that Nereus gained an apparent tactical advantage in appointing two arbitrators who in turn appointed a third arbitrator in the Nereus-Cepsa dispute, Nereus will be assured of an impartial arbitral tribunal by our decision to consolidate. The mere tactical advantage Nereus gained by Cepsa's previous unwillingness to accede to arbitration should not militate against consolidation in the absence of a specific

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[8] See Discussion at pp. 15-17, *supra.*

showing that consolidation will be prejudicial to a 'substantial right'." (A 220)

Nereus asserts that the District Court order of consolidation was erroneous because it ordered arbitration before a five-person panel and the arbitration clause of the Contract does not provide for a five-person arbitration panel. Nereus then proceeds to cite language from cases out of context for the proposition that a District Court may not within its discretion order a five-person panel for a consolidated arbitration if the agreement provides for three arbitrators.[9] For example, *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970), cited by Nereus, is a case involving grievance remedies provided by an employment contract and whether or not the contractual arbitration remedy barred the seeking of a remedy in federal court under Title VII of the Civil Rights Act. *Ocean Industries, Inc.* v. *Soros Associates International, Inc.*, 328 F.Supp. 944 (S.D.N.Y. 1971) involved a question of whether or not the parties agreed to arbitrate. However, the two consolidation of arbitrations cases cited by Nereus, *Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 16 A.D.2d 473, 229 N.Y.S.2d 200 (1st Dept. 1962), *aff'd* 12 N.Y.2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963), and *Stewart Tenants Corp.* v. *Diesel Construction Co.*, 16 A.D.2d 895, 229 N.Y.S. 2d 204 (1st Dept. 1962) clearly point to the correctness of Judge Stewart's Opinion.

In *Symphony Fabrics Corp.* the Appellate Division of the New York Supreme Court found no substantial prejudice in the consolidation of two arbitrations initiated pursuant to two separate contracts for the purchase and sale of substantially the same textiles. The court found that there was power to consolidate under the New York Civil Practice Act in effect at that time and concluded:

> "We believe that a fair and equitable result would be more likely to be reached if both of these proceedings

[9] For discussion of those cases citing the Federal Arbitration Act, see Point III *supra* at p. 12.

were tried together. In addition, there would undoubtedly be an earlier resolution of all controversies at a lesser expense than if the proceedings were separate." 16 A.D. 2d at 474, 229 N.Y.S. 2d at 201.

The Appellate Division noted that a party contracting to have his controversy tried before a certain forum cannot be compelled to litigate before any other but dismissed that problem because both contracts called for arbitration before the American Arbitration Association.

In *Stewart Tenants Corp.*, the same Court refused to consolidate two arbitration proceedings between the same parties because the two contracts which were involved provided for arbitration before two substantially different forums. Different forum in this sense did not mean a different *number of arbitrators* but instead referred to whether or not the arbitration would be heard before an appointee of the president of the Real Estate Board of New York, Inc. or an arbitration before the American Arbitration Association.

In the instant situation the two arbitrations not only provide for arbitration before the same forum (i.e. an arbitrator chosen by each party who then choses an "umpire") but both arbitrations have been instituted in fact under the same arbitration clause in the same contract. The only contractual difference is the mere number of arbitrators which Judge Stewart correctly concluded "did not involve substantial prejudice to Nereus." (A 220)

There can be no doubt that the "right to select an arbitrator is a valuable one." *Stef Shipping Corporation* v. *Norris Grain Co.*, 209 F.Supp. 249, 253 (S.D.N.Y. 1962). However, there is no authority to the effect that the number of arbitrators is in any way essential or that there is any difference between having three arbitrators with one chosen by each party and a third chosen as umpire when two parties are involved or by having five arbitra-

tors with three parties each choosing one and the three choosing two more. In fact, the existing authority is to the contrary. *Showa Shipping Co., Inc.* v. *Skibs A/S Agnes, etc.,* (Sup. Ct., Sp. Term, N.Y. Co. 1975). It is well settled that arbitration is a substitute for litigation agreed upon by the parties for commercial and economic reasons. *Farris* v. *Alaska Airlines,* 113 F.Supp. 907 (W.D. Wash. 1953). It is equally well settled in civil cases where a jury is frequently used "to assure a fair and equitable resolution of factual issues" that the reliability of the fact finder is not a function of its size. *Colgrove* v. *Battin,* 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973). *See also Williams* v. *Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) to the same effect in criminal cases.

The arbitration clause itself provides in part:

> "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York . . . pursuant to the laws relating to arbitration there in force, before a board of three persons, *consisting of one arbitrator to be appointed by Owner, one by the Charterer, and one by the two so chosen.* The decision of any two of the three on any point or points shall be final. (A 16c) [emphasis supplied]

Since the arbitration clause as written only contemplates two parties—an Owner and a Charterer—it was within Judge Stewart's discretion to resolve the ambiguity of how the Guarantor could or would participate in an arbitration by ordering a five-person arbitration panel. Judge Stewart's order preserved all the basic elements of the arbitration provision and at the same time resolved the ambiguity of the arbitration provision as it relates to the Guarantor. *Cf. LeHigh Coal & Navigation Co.* v. *Central R. of New Jersey,* 33 F.Supp. 362, 367 (E.D. Pa. 1940) which states "the interpretation and construction of written submissions is a question for the court."

The decision of Judge Stewart ordering a consolidated arbitration was a proper exercise of his discretion. Absent consolidation there could be irreparable injury to Hideca and no prejudice will result to any party in a consolidated arbitration in which all claims can be heard and there can be one determination of the facts and issues of the disputes arising under the Contract.

CONCLUSION

The appeals taken by Nereus, Docket Nos. 75-7206 and 75-7207, should be dismissed. If those appeals are not dismissed, then the order of the District Court dated March 21, 1975 should be affirmed.

Respectfully submitted,

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